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No. 01-34

IN THE

Supreme Court of the United States

SIEGEL-ROBERT, INC.,
Petitioner,

v.

THOMAS W. SWOPE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did a unanimous Eighth Circuit panel in this fact-specific diversity case follow well-established principles in correctly analyzing Missouri's corporation law when it applied the identical standards that would guide the Missouri Supreme Court in adjudicating the parties' dispute about the valuation of minority shares of stock in a closely-held Missouri corporation?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Thomas W. Swope, Judy W. Swope, Estate of O.W. Schneider, Jr. (Tracy Leigh Schneider Morris and O.W. Schneider, III, personal representatives), Kris Douglas Schneider[1], Melody Dawn Schneider, Mark William Schneider, Tracy Leigh Schneider, and O.W. Schneider, III respectfully request that the petition for writ of certiorari be denied.

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[1] The Petition erroneously refers to this Respondent as "Eric Douglas Schneider."

COUNTER STATEMENT OF THE CASE

This Counter Statement of the Case is submitted pursuant to S. Ct. R. 15.2 to correct misstatements of fact and law in the petition for certiorari.

Introduction

This diversity case involves the Eighth Circuit's straightforward application of Missouri's corporation laws to a voluminous evidentiary record developed after extensive pre-trial proceedings and a nine-day bench trial.

Petitioner Siegel-Robert, Inc. offered inadequate consideration to minority shareholders (including Respondents) when the company forced them to sell their shares in a 1997 squeeze-out merger. Respondents sought judicial determination of the "fair value" of their shares under a Missouri statutory remedy, MO. REV. STAT. § 351.455 (1997) and brought suit in the Eastern District of Missouri pursuant to diversity jurisdiction. The Eighth Circuit unanimously affirmed a judgment that the company undervalued Respondents' stock by at least $19.2 million on a marketable minority basis. The Eighth Circuit also ordered a remand to determine the additional amount needed to reflect the "enterprise" value of the shares as Missouri law requires.

Petitioner now seeks certiorari to reverse this adverse judgment. It advances no reason why this fact-specific state law decision implicates any issue warranting involvement by this Court.

The Eighth Circuit applied well-established principles governing how federal courts should decide state law issues in a diversity case. The Eighth Circuit applied those principles to a question of first impression under Missouri law: whether fair value of stock under MO. REV. STAT. § 351.455 is defined as the enterprise value, *i.e.*, the shareholder's proportionate share of the value of the company rather than a lower value discounted for lack of marketability or lack of majority control.

In deciding how the Missouri Supreme Court would rule on the issue today, the Eighth Circuit considered authorities and case law that the Missouri Supreme Court consistently consults in its fair value decisions. A-8-14, A-17-20. The Eighth Circuit concluded that the Missouri Supreme Court would define fair value as the enterprise level of value without discounts for lack of marketability or minority status, and explained how that conclusion fully accords with prior Missouri "fair value" decisions. A-8-10, A-19-20. This is precisely how a federal court sitting in diversity is required to act when analyzing state law issues under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny.

The panel that Petitioner unjustifiably accuses of usurping state authority included a former state supreme court judge (Chief Judge Wollman), a former state court of appeals judge (Judge McMillian, who wrote the opinion), and a former state bar association president (Judge Bye). This panel was mindful of the proper role of a federal court sitting in diversity. These judges—and their colleagues on the Eighth Circuit who unanimously denied the Petition for Rehearing—correctly applied settled law governing how federal courts determine the manner in which a state's highest court would rule on a question not previously decided.

The Eighth Circuit therefore acted in full accord with the federalism principles of *Erie*. Indeed, that court would have done serious violence to those principles if it adopted Petitioner's position. A contrary ruling would have required the federal courts to misinterpret Missouri law and improperly place Missouri at odds with virtually every other jurisdiction, contrary to the state's fair value case law. It is unnecessary, and would be unprecedented, for this Court to use its valuable and limited resources to review the intricacies of Missouri's corporation laws that the Eighth Circuit carefully and correctly analyzed and applied to a voluminous evidentiary record developed after a nine-day trial.

Background

Petitioner is a corporation co-founded by Bruce Robert. A-3. When Mr. Robert was in charge of the company, it offered employees the opportunity to buy stock. A-3. Eventually these minority shareholders owned 7% of the company; members of the Robert family owned the other 93%. A-27.

In 1997, Petitioner unilaterally effected a squeeze-out merger. Robert family shareholders received shares in a successor company while the non-family shareholders were forced out as shareholders and offered $20 per share. The ostensible rationale was to qualify for tax-advantaged Subchapter S status, although as both the District Court and Court of Appeals noted, it was not necessary to force out the non-family members to do so. A-4; A-39.

The $20 per-share price was set unilaterally by Petitioner's CEO. He did not consult with an appraiser or other valuation professional, other corporate officers who owned the stock (some of whom objected to the $20 price when they were informed after the fact), or anyone else. A-4. The District Court noted (A-48-49) that at the time of the merger, Respondent had $202 million in cash, "which translates into slightly more than $15 per share of value." The $20 price therefore valued all of the company's non-cash assets at $5 per share—a risible figure for a diversified manufacturing company with $553 million in annual sales. *Id.* While companies are normally valued at multiples, rather than fractions, of book value, the $20 price was below book value. A-42.

Respondents—company retirees or their heirs—dissented from the merger and exercised their statutory right under MO. REV. STAT. § 351.455 to seek judicial determination of the fair value of their shares. Only then did Petitioner hire an appraiser, who told the company that $20 per share was not fair value. A-38, 39. Petitioner's expert also agreed with

Respondents' expert that fair value was different than "fair market value." ("Fair market value" presumes a willing seller and buyer and an arms length transaction, which is not the case in an involuntary squeeze-out merger.) A-46.

Petitioner's expert also agreed with Respondents' expert that prior transactions in which the company bought back its own stock on a "take it or leave it" basis, and past fair market value appraisals for estate tax purposes, were not relevant to determining fair value because those were not arms length transactions or fair value appraisals. A-11. These are the valuations referred to in the Petition at page 4 as support for the $20 price. Petitioner never explained below, and does not explain in its Petition here, why these transactions should be relevant to fair value when its own expert said they were not. This is perhaps the most glaring example of a recurring motif in the Petition, which frequently discusses (and mischaracterizes) matters unrelated to the appraisal issues tried below and irrelevant to the legal questions on which certiorari supposedly is being sought.

Both parties' experts agreed that there are three potential levels of "fair value" valuation for a bloc of minority stock: the "enterprise" value, which is the proportionate share of the value of the entire company; the "marketable minority" value, which discounts that value because the minority shares do not represent control; and the "non-marketable minority" value, which contains discounts for lack of control and lack of liquidity. A-5. Respondents' expert testified that fair value was $98.40 per share on an "enterprise" basis, which he calculated by applying a control premium to a marketable minority valuation of $72.90. (Both parties' experts agreed that applying a control premium in this manner is an accepted method to calculate enterprise value). Petitioner's expert testified that the per-share fair value was $46.20 on a marketable minority basis and $30 if a discount for lack of marketability were applied. *Id.*

The District Court issued a 93-page decision that discussed each expert's testimony in detail and concluded that fair value on a marketable minority basis was $63.36 per share. A-125. The District Court "generally agreed with the [Respondents'] expert" on the valuation of the stock on a marketable minority basis, but adjusted his valuation downward (from $72.90 to $63.36) because the District Court thought that expert was too optimistic about future growth. A-15.[2]

Petitioner appealed, claiming that the District Court did not adequately explain its decision and that it should have applied a discount for lack of marketability. Respondents then cross-appealed and asserted that under Missouri law, fair value should be determined using the enterprise level. The most recent previously reported case construing § 351.455, *Hunter v. Mitek Industries, Inc.*, 721 F. Supp. 1102 (E.D. Mo. 1989), held that fair value is the enterprise level of value.

The Delaware Supreme Court ruled in 1989 that fair value should be determined using the enterprise level. *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137 (Del. 1989). At least twenty other states with fair value statutes have since ruled the same way, most citing to *Cavalier Oil*.[3] The American Law

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[2] In another of the many instances where Petitioner discusses, inaccurately, an issue on which it is not seeking certiorari, it complains (A-6) that the District Court did not adequately explain its reasoning. The District Court actually discussed in detail why it believed Respondent's expert was more credible. To cite one example, Respondents' expert took into account that the company had diversified since 1981 and that more than 40% of the company's value was now in subsidiaries that were in lines of business other than the original core business of manufacturing automobile parts. Petitioner's expert, in contrast, valued the company solely as an automotive parts manufacturer, ignoring the role played by the subsidiaries. A-89.

[3] Many of these cases are cited in the Eighth Circuit opinion at A-16-20. Other examples include *Advanced Communication Design, Inc. v. Follett*, 615 N.W.2d 285, 290 (Minn. 2000); *First Western Bank Wall v. Olsen*, 621 N.W.2d 611, 618-19 (S.D. 2001); and *HMO-W Inc. v. SSM Health*

Institute ("ALI") has also issued a standard that fair value should be determined using the enterprise level of value without marketability or minority discounts. American Law Institute, PRINCIPLES OF CORPORATE GOVERNANCE § 7.22(a) (1994). A-12.

The Eighth Circuit concluded that Missouri would apply the same rule under MO. REV. STAT. § 351.455. The Eighth Circuit acknowledged that one Missouri intermediate appellate court had permitted a minority discount. *King v. F.T.J., Inc.*, 765 S.W.2d 301 (Mo. Ct. App. 1988). The Eighth Circuit concluded that it was not bound to follow *King* (which pre-dates *Cavalier Oil*) because it was "convinced by other persuasive data that the highest court of the state would decide otherwise." A-19.

In reaching this conclusion, the Eighth Circuit examined the sources of law that the Missouri Supreme Court uses in its fair value § 351.455 case law. The Eighth Circuit explained that awarding less than the shareholder's proportionate share of the value of the company is incompatible with the history and purpose of the fair value statute as it has been interpreted by the Missouri Supreme Court in prior cases. A-16-17. The Court also noted that Missouri's fair value statute is worded similarly to that of other states and interpreted by Missouri courts with reference to case law from those states, especially Delaware. Virtually all of these states have ruled that fair value is the proportionate share of the company without discounting for lack of marketability or lack of control. A-18-19. For these reasons, the Eighth Circuit concluded that "if deciding the issue today, the Missouri Supreme Court would follow the compelling logic of the current trend toward

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Care System, 611 N.W.2d 250, 256-57 (Wis. 2000). Illinois is the only state that to date declined to follow *Cavalier Oil*. A-20 n. 3.

disallowing minority and marketability discounts in dissenting shareholders' fair value appraisal determinations." A-20.

The Eighth Circuit accordingly affirmed the judgment that fair value was $63.36 per share on a marketable minority basis and remanded for further proceedings to determine the enterprise level of value based on that figure. A-24.[4]

REASONS WHY THE WRIT SHOULD BE DENIED

The Petition cites two mutually contradictory reasons for granting certiorari. The first "Question Presented" posits that the Eighth Circuit did not follow "squarely controlling" Missouri Supreme Court precedent on the enterprise value issue. The second "Question Presented," however, assumes that the Missouri Supreme Court has *not* ruled on the issue, and asks the Court to resolve (unspecified) "confusion" among the Circuits about the extent to which *intermediate* state appellate court decisions must be followed by federal courts sitting in diversity.

Each question is based on a false premise. The Eighth Circuit did not overrule or disregard prior Missouri Supreme Court precedent on the enterprise value issue, and the Eighth Circuit explained why its conclusion is mandated by the Missouri Supreme Court's prior cases construing MO. REV. STAT. § 351.455. Nor is there any "confusion" among the Circuits as to how federal courts sitting in diversity should treat intermediate appellate court decisions. The Eighth Circuit ruled that it was not bound by the intermediate appellate decision in *King* because it was "convinced by other

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[4] The Court of Appeals also ruled that the District Court erred by calculating prejudgment interest using a rate derived from the federal postjudgment interest statute, 28 U.S.C. § 1961 (1994), rather than Missouri's statutory prejudgment interest statute, MO. REV. STAT. § 408.020 (1999).

persuasive evidence" that the Missouri Supreme Court would rule differently today. The federal courts uniformly follow the same standard under *Erie.*

1. The Eighth Circuit Did Not Overrule Or Disregard Prior Missouri Supreme Court Precedent On The Enterprise Value Issue.

The Eighth Circuit correctly understood that a federal court sitting in diversity must apply state law as determined by the state's highest court. If the state supreme court has not ruled on an issue, the federal court is duty bound under *Erie* to determine how that court would rule on the question. A-18-19. The Eighth Circuit correctly applied these principles to the question of how "fair value" is to be determined under MO. REV. STAT. § 351.455, and explained why the Missouri Supreme Court would define fair value as the enterprise level.

As the Eighth Circuit noted, prior Missouri cases have explained that the fair value statute was enacted after minority shareholders lost their veto power over mergers that at common law required unanimous approval. A-8-14, *citing Phelps v. Watson-Stillman Co.,* 293 S.W.2d 429, 433 (Mo. 1956); *Flarsheim v. Twenty Five Thirty Two Broadway Corp.*, 432 S.W.2d 245, 253 (Mo. 1968); *Dreiseszun v. FLM Indus., Inc.,* 577 S.W.2d 902, 907 (Mo. Ct. App. 1979); and *Hunter v. Mitek Indus., Inc.,* 721 F. Supp. at 1106-07.

The purpose of the fair value statute is to ensure that mergers that can now be unilaterally imposed by the majority do not deprive the minority of full compensation for the value of the property being taken from them. A-8-9. Forcing the minority to surrender their ownership at a discount (*i.e.,* for less than the proportionate share of the company that a share of stock represents) would confer a windfall on the majority and defeat the purpose of statutory appraisal. *Id.* Thus, the enterprise level of value is required to give minority shareholders the fair value MO. REV. STAT. § 351.455 mandates. A-8-9; A-17-19.

The Eighth Circuit's thorough review of Missouri case law makes clear that it did not disregard any controlling Missouri precedent. Petitioner claims that the Eighth Circuit ignored two "squarely controlling" Missouri Supreme Court opinions: the 1956 *Phelps* decision and *Hoffman v. Hoffman*, 676 S.W.2d 817 (Mo. 1984) (en banc).

It borders on the frivolous to suggest that *Hoffman* is "squarely controlling" on any issue of fair value. The case does not discuss fair value or § 351.455. *Hoffman* discusses "fair *market* value" of assets in a divorce case under MO. REV. STAT. § 452.330 (1983). The Eighth Circuit correctly rejected *Hoffman* and other "fair market value" cases because, as noted above, and as Petitioner's own expert testified, "fair market value" and "fair value" are two different things. A-11; A-23-24. [5] The Missouri Supreme Court has never cited a "fair market value" divorce case in any § 351.455 "fair value" decision. The Eighth Circuit would have violated *Erie* if it had disregarded Missouri law and taken the unprecedented step of applying a divorce case to a "fair value" decision.

It is equally disingenuous to describe *Phelps* as "squarely controlling" on the question of enterprise value (an argument Petitioner did not make to the Eighth Circuit panel). Petitioner now claims that *Phelps* prohibits using enterprise value. *Phelps* said no such thing. The trial court in *Phelps* determined "fair value" on a liquidation (rather than going concern) basis. *Phelps* held that the trial court was wrong to restrict its appraisal to liquidation value and that the trial

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[5] This is one of the reasons why the Eighth Circuit correctly affirmed the District Court's refusal nearly a year after entry of judgment to consider supposedly "newly discovered evidence" of an estate tax appraisal of some of Mr. Robert's stock. The Eighth Circuit correctly ruled that this was not an abuse of the District Court's discretion because that was a "fair market value" appraisal and Petitioner prevented discovery of similar fair market value and estate/gift tax appraisals before trial. A-23-24.

court should consider "every relevant fact and circumstance." *Phelps*, 293 S.W.2d at 433. It was in the context of that holding that the Missouri Supreme Court made the following statement that Petitioner distorts by omitting the italicized language:

> *In the various [fair value] statutes* the terms "value," "fair value," "fair cash value," and "fair market value' *are abstract and in a sense perhaps meaningless* [citation omitted]; *they nevertheless* have the same general meaning *and purposefully if not wisely establish a flexible general standard for fixing value between parties who are either unable or unwilling to voluntarily agree.*

293 S.W.2d at 433, cited by the Eighth Circuit at A-7.

There is simply no way that this language requiring every fact and circumstance to be considered in a fair value case can be read as a "squarely controlling" holding that Missouri requires or permits minority discounts or other departures from enterprise value. Indeed, in *Phelps* and every other reported Missouri fair value case except the anomalous intermediate appellate decision in *King*, fair value was calculated without a marketability or a minority discount—in other words, by using the enterprise value. One of the Delaware cases *Phelps* cited as authority was *Tri-Continental Corp. v. Battye*, 74 A.2d 71 (Del. 1950). *Phelps*, 293 S.W.2d at 493. *Battye* specifically states that a "fair value" plaintiff should receive "his proportionate interest" in the company as a whole. 74 A.2d at 72. This statement has since been cited, in *Cavalier Oil* and elsewhere, as support for the conclusion that enterprise value is required. *E.g., Cavalier Oil*, 564 A.2d at 1144. The Eighth Circuit's identical holding therefore comports with a source cited as authoritative in *Phelps*.

For these reasons, the Eighth Circuit correctly concluded that fair value under § 351.455 requires using the "enterprise

value" based on prior interpretations of the statute by Missouri courts. A-7-10. The Eighth Circuit also correctly noted that this interpretation of the fair value statute was in accord with the conclusions of authoritative commentators such as the ALI and the nearly unanimous case law of other states with fair value statutes, including the Delaware Supreme Court's *Cavalier Oil* decision. A-11-12; A-19-20.

Petitioner claims that MOORE'S FEDERAL PRACTICE disapproves interpreting state law by consulting commentators or decisions from other states with similar statutes. MOORE'S actually says that in determining state law, "[f]ederal courts may consider scholarly treatises, law review articles, and Restatements of the law . . . . A federal court may examine cases from other jurisdictions to determine what law the controlling state will adopt, particularly in the complete absence of any state decisions." 17 MOORE'S FEDERAL PRACTICE § 124.22[3] at 124-87-88 (3d ed. 1997). This precisely describes what the Eighth Circuit did here.

The Eighth Circuit was correct to refer to these sources because they are the very ones the Missouri Supreme Court considers in interpreting MO. REV. STAT. § 351.455. *E.g., Phelps,* 293 S.W.2d at 433 (citing Delaware, Pennsylvania, New York and Illinois decisions). Indeed, a respected treatise written by partners of the firm representing Petitioner refers to Delaware case law as an authoritative source for determining "fair value" under Missouri law. Hansen & Lents, MISSOURI CORPORATION LAW AND PRACTICE § 8.5[b] at 8-28-29 (3d ed. 1999).[6]

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[6] Although Petitioner complains about the Eighth Circuit's citation of case law from outside Missouri, it claims that the Eighth Circuit violated *Erie* by not following the one state, Illinois, that to date has not adopted the majority view. The Eighth Circuit explained why Illinois opinions should not be controlling in contrast to the overwhelming majority of decisions from other states that have fair value statutes similar to § 351.455. A-20 n. 3.

Missouri "fair value" cases similarly consider treatises and commentators of the type cited by the Eighth Circuit in its analysis of the "enterprise value" issue. *E.g., Phelps,* 293 S.W.2d at 433 (citing treatises); *Flarsheim,* 432 S.W.2d at 255 (citing treatise). On issues of substantive law, the Missouri Supreme Court almost always adopts the majority view as reflected in decisions from other states and the ALI. *E.g., State v. Hibler*, 5 S.W.3d 147, 150 (Mo. 1999) (en banc); *Deutsch v. Wolff*, 994 S.W.2d 561, 566 (Mo. 1999) (en banc); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110-11 (Mo. 1996) (en banc) (adopting standard followed by a "growing majority of states"). A court that was duty bound under *Erie* to determine state law in the same manner as the Missouri Supreme Court would have violated that obligation if it ignored Delaware and other state decisions or the ALI position when Missouri courts consider those sources in "fair value" cases and substantive law issues generally.

The unanimous Eighth Circuit opinion applied the accepted standard for determining an issue of state law. It decided the question in the same manner that the Missouri Supreme Court would do today, just as *Erie* requires. No issue warranting certiorari is implicated by this decision.

2. There Is No "Confusion" Among The Circuits Regarding The Role Of Intermediate Appellate Court Decisions In Diversity Cases And The Eighth Circuit Correctly Applied The Prevailing Standard.

Petitioner alternatively seeks certiorari to obtain "clarification" about the proper role of intermediate state appellate court decisions in determining state law. The Eighth Circuit, however, correctly stated and applied settled law on this question when it concluded that it would not follow *King*, the sole Missouri decision that permitted a minority discount.

As the Eighth Circuit correctly stated, it is well settled that when there is no definitive state supreme court decision, federal courts should follow decisions of intermediate state appellate courts "when they are the best evidence of what state law is" and the federal court is not "convinced by other persuasive data that the highest court of the state would rule otherwise." A-19 (citation omitted).

This is the standard uniformly applied by the federal courts at least since *West v. American Telegraph & Telegraph Co.*, 311 U.S. 223, 237 (1940) ("Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*") (emphasis added). This rule does not depart in any way from *Erie* or any other prior decision of this Court or any Circuit Court decision.

Indeed, the rule that intermediate appellate decisions are not binding if the federal court is convinced by other persuasive data that the state's supreme court would rule differently is the very standard stated and applied in each of the cases cited in the Petition. *E.g., Barfield v. Madison County, Miss.*, 212 F.3d 269, 272 (5th Cir. 2000) ("[W]e are bound by an intermediate state appellate court decision unless convinced by other persuasive data that the highest court of the state would decide otherwise.") (quotations omitted); *Green v. Walker*, 910 F.2d 291, 294 (5th Cir. 1990) ("The decision of an intermediate appellate state court guides, but does not necessarily control . . . when there is persuasive data that the highest court of the state would decide otherwise than the intermediate appellate . . . court.") (quotations omitted).[7]

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[7] *See also Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1003 (4th Cir. 1998) ("A federal court can depart from any intermediate court's fully reasoned holding as a state law only if convinced that the state's highest court would not follow that holding.") (quotation and citation

Petitioner cites MOORE'S FEDERAL PRACTICE, but that authority also agrees that intermediate appellate decisions need not be followed if there is "persuasive data [that] shows a state supreme court would decide differently." *Id.* at 124-86. That is the rule the Eighth Circuit expressly followed here.

Applying that standard, the Eighth Circuit noted *King* was decided before the modern majority view was adopted in other "fair value" states and by the ALI. A-19-20. No other Missouri case permits minority discounts. The Eighth Circuit concluded that *King* does not reflect how the Missouri Supreme Court would rule today based on authorities the Missouri Supreme Court itself cites in its past "fair value" cases, prior Missouri case law and decisions from other "fair value" jurisdictions and authoritative commentators.

The cases cited by Petitioner to demonstrate conflict with *Erie* do not support its position. *West v. American Telegraph & Telegraph Co.* specifically stated that intermediate state appellate decisions were not binding on a federal court that was "convinced by other persuasive data that the highest court of the state would decide otherwise." 311 U.S. at 237. *AG Services of America, Inc. v. Nielsen*, 231 F.3d 726, 735-36 (10th Cir. 2000) rejected reliance on intermediate New Mexico appellate decisions in favor of dicta from the state's

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omitted); *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481, 1485 (6th Cir. 1989) ("[A] federal court may not disregard a decision of the state appellate court on point, unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."). The cases that Petitioner suggests follow a different standard actually apply the identical rule. *E.g., Weber v. GAF Corp.*, 15 F.3d 35, 37 (3d Cir. 1994) ("[O]ur rule in diversity cases is to predict what the Supreme Court of the state would decide . . . . [citation omitted] [W]e need only rely on the decisions of state intermediate appellate courts when we find them persuasive.")

Supreme Court. Similarly here, the Eighth Circuit did not believe one intermediate Missouri appellate decision was binding.

In the other cases cited by Petitioner, the federal Circuit Courts followed the same standard as the Eighth Circuit regarding the role of intermediate state appellate decisions. Under that standard, those cases decided to apply intermediate state appellate decisions that were reported *after* the District Court had ruled. *E.g., Galindo v. ARI Mut. Ins. Co.,* 203 F.3d 771, 775-777 (11th Cir. 2000); *Puckett,* 889 F.2d at 1485. There is no such circumstance here. The Eighth Circuit declined to follow an anomalous intermediate appellate decision that was decided in 1988 and that is contrary to other Missouri cases and the majority rule that has been almost universally adopted in the past thirteen years.

In sum, the Eighth Circuit did not rewrite Missouri law, encourage forum shopping, or wreak any of the other havoc imagined by Petitioner. The unanimous Eighth Circuit decision applied established principles and examined the sources of state law that federal courts sitting in diversity have always applied under *Erie* and that Missouri courts have followed in past fair value cases. It is Petitioner that seeks to eviscerate *Erie* by asking the federal courts to put Missouri at odds with not only its own jurisprudence, but also with virtually every other state as well as the American Law Institute. The Eighth Circuit's carefully considered and well-reasoned opinion does not raise any question warranting this Court's review.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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